No. 7984.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

ARMOUR & COMPANY, a corporation,

Appellant,

vs.

NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant:

GIBSON, DUNN & CRUTCHER, Esqs.,
J. C. MACFARLAND, Esq.,
Banks Huntley Building,
Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney,
CLYDE THOMAS, Esq.,
Assistant United States Attorney,
Federal Building,
Los Angeles, California.

United States of America, ss.

To NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14th day of October, A. D. 1935, pursuant to order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled ARMOUR & COMPANY, a corporation, Plaintiff, vs. NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant, wherein Armour & Company is appellant, and you are appellee to show cause, if any there be, why the

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.....

in the said.....mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 14th day of Sept, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth

Paul J. McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Receipt is hereby acknowledged of a copy of the within Citation on Appeal this 16th day of September, 1935. Peirson M. Hall, United States District Attorney. Clyde M. Thomas, Assistant United States District Attorney, By Peirson M. Hall, D. H. attorneys for defendant. Filed Sep. 16, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

* * * *

ARMOUR & COMPANY, a corporation, Plaintiff, v. NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 740-C In Equity BILL OF COMPLAINT AND PETITION FOR INJUNCTION

* * * *

The plaintiff, Armour & Company, a corporation, brings this, its bill of complaint, against the defendant, Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, and for grounds of complaint the plaintiff says:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and has its principal office and place of business in the City of Chicago, State of Illinois; that also it is qualified to do business in the State of California and has an office and place of business in the City of Los Angeles, State of California, within the said Sixth Collection Dis-

trict of California and within the Southern Judicial District of the State of California.

II.

That the defendant, Nat Rogan, is the duly appointed, qualified, and acting Collector of Internal Revenue for the said Sixth Collection District of California and is a citizen of the United States of America and of the State of California and resides in the City of Los Angeles, County of Los Angeles, State of California and in the Sixth Collection District of California and in the Southern Judicial District of California.

III.

That this is a suit of a civil nature arising under the constitution and laws of the United States of America, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00).

IV.

That the plaintiff is, and has been since its organization, engaged in the business of slaughtering animals, including hogs, and packing and selling meat products, and that plaintiff owns and operates slaughtering houses and packing plants in the State of New Jersey and leases and operates a slaughtering house and packing plant in the City of Los Angeles, State of California, and in other cities; that the meat products manufactured and produced by the plaintiff, including those from the processing of hogs, are sold and dealt in by it in foreign, intrastate, and interstate commerce; that the slaughtering and processing of hogs is a business of intrastate character exclusively, being performed in its entirety within the limits

of the states wherein the plaintiff's plants are respectively established and operated.

V.

That there was adopted by the 73rd Congress and approved, May 12th, 1933, an Act, P. L. No. 10, popularly known as the "Agricultural Adjustment Act", but officially entitled:

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes."

and that said Act, for convenience hereinafter, will be referred to by its popular title, namely, the Agricultural Adjustment Act.

VI.

That the policy, to be effectuated by the enactment of said Act, was declared, by Congress, in Section 2, to be:

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco, shall be the pre-war period, August 1900-July 1914. In the case of tobacco, the base period shall be the post-war period, August 1919-July, 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period, August 1909-July 1914."

That in pursuance of and for the purpose of effectuating the declared policy, the Act established as its dominant and essential feature a scheme whereby the Secretary of Agriculture was given extensive powers to reduce and control agricultural production, and thereby enhance agricultural prices, which scheme is in substance as follows:

(1) The Secretary of Agriculture was empowered by Section 8 (1) to provide for reduction in the acreage or in the production for market, or both, of any of the enumerated agricultural commodities, which were designated as basic, through agreements with producers or by other voluntary methods;

(2) By the same section, the Secretary was empowered to provide for rental or benefit payments in connection with such agreement, that is, to make rental or benefit payments to the producers who sign such agreements to reduce acreage or production, "in such amounts as the Secretary deems fair and reasonable";

(3) By Section 9 the Secretary was empowered, whenever he determined that rental or benefit payments should be made with respect to any basic agricultural commodity,

so to proclaim and thereby put into effect from and after the beginning of the marketing year for the commodity next following such proclamation, a so-called processing tax levied upon and collectible from the processors of such commodity on account of the first domestic processing of such commodity.

(4) By Section 9 the Secretary was empowered to determine and fix the rate of the processing tax, but it was provided that the tax should be at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity", which is defined to be the "price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the based period," i. e., August, 1909 to July, 1914. But, if the Secretary should find that the tax at such rate would cause such a reduction in the quantity of the commodity or products thereof, domestically consumed, as to result in the accumulation of surplus stocks of the commodity or products thereof, or in the depression of the farm price of the commodity, then the processing tax should be at such rate as would prevent such accumulation of surplus stocks and depression of the farm price of the commodity.

(5) By Section 9 the Secretary was empowered to determine when rental or benefit payments and the processing tax in respect to a basic agricultural commodity should terminate.

(6) By Section 11, hogs, among other commodities, were included in the expression "basic agricultural commodity," and the Secretary of Agriculture is given power to exclude any such commodity from the operation of the statute if he finds, after notice and hearing, that the

policy of said Act, with respect to such commodity can not be carried out because of conditions of marketing production or consumption, thereby giving to said Secretary power to establish a price differential in favor of commodities which compete with pork products.

(7) By Section 12 the proceeds from the processing taxes were appropriated in advance for the payment of rental and benefit payments, the cost of administering the Act, refunds of processing taxes and for certain other general purposes of the Act, and no other appropriation for the rental of benefit payments has ever been made by the Congress.

VII.

That Section 9, paragraphs (a), (b), and (c) of said Act provide, in part, as follows:

"(a) * * * When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; *. * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such require-

ments. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity."

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that any such result will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stock and depression of the farm price of the commodity."

"(c) * * * * the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in Section 2 (August 1909-July 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

VIII.

That, in addition to the above enumerated powers, which constitute the chief plan and design of the Act, there were vested in the Secretary of Agriculture by the Act certain incidental powers, to wit:

(1) The power to enter into marketing agreements with processors, association of producers, and others engaged in the handling in the current of interstate or foreign commerce of any agricultural commodity or product thereof;

(2) The power to issue licenses permitting processors, associations of producers and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or products thereof, to fix, within certain broad limits, the terms and conditions of such license and to revoke or suspend any such license for violation of the terms or conditions thereof.

(3) To make, with the approval of the President, regulations to carry out the powers vested in the Secretary by the Act and to fix the penalty for the violation of any such regulation not exceeding $100 in amount.

IX.

That, by virtue of the supposed authority conferred upon him by the said Act, the Secretary of Agriculture has made the following determination and orders in regard to hogs, one of the basic agricultural products named in the Act, viz:

(1) A proclamation, as of August 17th, 1933, that benefit payments were to be made with respect to hogs.

(2) A determination from statistics of the Department of Agriculture, that the difference as of Nov. 5th, 1933,

between the current farm price of hogs and the fair exchange value was $4.21 per cwt. live weight.

(3) A determination, after a hearing held in Washington on Sept. 5th, 1933, that the imposition of a processing tax of $4.21 per cwt. live weight would result in an accumulation of surplus stocks of hogs, or the products thereof, or the depression of the farm price of hogs, and that the following rates of the processing tax would prevent such results:

50¢ per cwt. live weight, effective as of Nov. 5th, 1933;

$1.00 per cwt. live weight, effective as of Dec. 1st, 1933;

$1.50 per cwt. live weight, effective as of Jan. 1st, 1934; and

$2.00 per cwt. live weight, effective as of Feb. 1st, 1934.

(4) A determination as of Dec. 21st, 1933, that adjustment of the rate of the tax was necessary and that as of Jan. 1st, 1934, the tax should be $1.00; as of Feb. 1st, 1934, $1.50; and, as of March 1st, 1934, $2.25 per 100 lbs. live weight, which rates, according to the Secretary, would prevent the accumulation of surplus stocks and the depression of the farm price of hogs.

X.

That, as a result of these determinations and orders, a processing tax in respect to hogs became effective Nov. 5th, 1933, and has continued and is now in effect and that the rate of said tax for each cwt. live weight has been, from time to time, as follows:

50¢ from Nov. 5th, 1933 to Dec. 1st, 1933.

$1.00 from Dec. 1st, 1933 to Feb. 1st, 1934.

$1.50 from Feb. 1st to March 1st, 1934.

$2.25 from March 1st, 1934 to the present time, and such rate is now in effect.

That plaintiff is informed and believes and therefore, upon such information and belief, charges the fact to be that the Department of Agriculture has to date collected over $866,000,000 in all processing taxes and has disbursed the same amount pursuant to the terms of said Act and that future processing taxes intended to be collected and disbursed will amount to over $360,000,000 per annum.

XI.

That, under the supposed authority of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and collected by the defendant from, the plaintiff a processing tax at the rate prevailing at the time of collection on all hogs slaughtered by plaintiff at the plant operated by it as lessee in the City of Los Angeles, State of California, since January 19, 1935, and that the amounts of such tax assessed against and collected from the plaintiff by months on all hogs so slaughtered by it (a calendar month being the period for which the tax must be returned and paid) are as follows:

Month	Year	Total
January	1935	$11,048.69
February	1935	19,477.48
March	1935	17,362.28
April	1935	18,507.91
May	1935	21,624.35
		$88,020.71

XII.

That under the terms of said Act and the determinations and orders of the Secretary of Agriculture pursuant thereto, there has been assessed by the Commissioner of Internal Revenue against, and there is now claimed to be due from the plaintiff processing tax for the month of June, 1935, in the amount of $15,789.69 on account of hogs slaughtered by the plaintiff at the said plant operated by it as lessee in the City of Los Angeles, State of California; that the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, is charged with the duty of collecting said tax; that under applicable statutes and regulations of the Treasury Department, if the plaintiff does not make the said payment, the said Collector will serve upon the plaintiff notice and demand, and plaintiff will be allowed ten days from the receipt of such notice and demand within which to pay said tax and in the event of failure to pay within said time, defendant will assert against plaintiff a penalty equal to five per centum of the amount of the tax and interest on the tax at the rate of one per centum a month from the due date of the tax until it is paid; and that in the event plaintiff fails to pay said tax within ten days after receipt of said notice and demand defendant will proceed to collect the tax, penalty and interest by filing a notice of lien upon all of plaintiff's property and distraining upon and selling such of plaintiff's property as may be necessary in order to realize the amount of said tax, penalty and interest; that additional processing tax for months subsequent to June, 1935, will accrue and will be assessed against and collected from plaintiff, just as the processing tax for the month of June will be, in the manner described, unless the defendant is restrained and enjoined from asserting and collecting said taxes.

XIII.

That there are now pending before the Congress certain amendments to said Act, some of which have been adopted and passed by the House of Representatives and others of which have been adopted and passed by the Senate; that the purpose and effect of said amendments was explained in the report (No. 1011, to accompany H. R. 8492) of Mr. Smith for the Committee on Agriculture and Forestry, to be, among other things, a withdrawal by the United States of the right of a taxpayer to sue for refund in the event that said Act be declared unconstitutional, on the assumption that the tax has been passed on to the consumer, said report being quoted in part in Exhibit A hereto.

XIV.

That the theory and effect of said Act, in particulars here relevant, are explained in official publications issued by the Department of Agriculture, Agricultural Adjustment Administration, attached as Exhibit B hereto, wherein it is stated that "Who pays the processing tax depends on the supply and demand conditions for a given commodity" and that, under varying conditions the tax is borne by producer, processor and consumer, in varying and fluctuating amounts.

XV.

That the plaintiff is not able to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture and also the existing processing tax of $2.25 for each 100 pounds live weight of hogs purchased by it; that more than fifty (50) separate and distinct products result from the processing of a hog, all of which products are sold by the plaintiff; that, because of the

nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for the plaintiff or for any one else to ascertain what portion of the processing tax, payable because of the processing of any 100 pounds live weight of any hog, is assignable to the products resulting from such processing, in that in the normal course of business of the plaintiff, a hog is purchased on a given day, is processed the same or the next day and the products are sold as individual pieces from ten days to four months later, during which time the market prices at which such products are sold have been constantly and daily fluctuating; that said processing taxes paid and to become due and payable by plaintiff under said Act cannot be recovered or recouped by it as a result either of adding said tax to the product or of subtracting the said tax from the price paid to the raisers of hogs, for the reason that hogs are bought and pork products are sold in competitive markets; that the price at which pork products can be sold in the market is determined, not only by competition from other packers, but also by competition which other food products give pork, by consumer demand and by the price which the consumer will pay.

XVI.

That the supposed standard or formula established by said Act as a supposed guide to the Secretary of Agriculture is, in fact, non-existent and a mere mental concept subject to unlimited variation by arbitrary selections of articles and grades or averages of grades of articles which undisclosed individuals think farmers buy, and of grades and weights or averages thereof of articles taxed; of markets in which said articles and grades are dealt; by choice between high, low and average prices for days,

weeks, months, or averages thereof; and by a purely arbitrary determination by collectors of statistics as to whether or not any price or all prices should be weighted for volume of trade.

That said processing taxes are not taxes in any constitutional sense but are merely a means and devise whereby the intrastate production of products resulting from processing may be controlled, limited and increased at will by the Secretary of Agriculture; that numerous suits have been instituted by competitors of plaintiff and numerous injunctions have been issued by other courts protecting said competitors against assessment and collection of such processing taxes and if plaintiff be not granted similar relief, it will be at a disadvantage, competitively, in conducting its business; that the plaintiff's losses from the processing of hogs have been directly increased as a result of the effect of said processing taxes and that the plaintiff is no longer justified in acquiescing, by the payment of said taxes in the expectation of refunds, in experiments with its capital.

XVII.

That the said Agricultural Adjustment Act, and the provisions thereof for the levy of the processing taxes, is unconstitutional and void for the following reasons:

(1) The said Act enacted a scheme designed to regulate and control the production of hogs, corn, cotton and certain other agricultural commodities specified in the Act, and the so-called processing taxes imposed by the Act are an integral part of the scheme of regulating and controlling the production of such commodities. The regulation and control of the production of such commodities is not within the scope of any of the powers vested in the Congress by the Constitution, and is, therefore, within the

powers reserved to the States as expressly provided by the 10th Amendment to the Constitution;

(2) The so-called processing taxes were not imposed under or in conformity with the power vested in the Congress by Section 8, Article 1 of the Constitution to levy and collect taxes, duties, imposts and excises in that they were not imposed to pay the debts or to provide for the common defense or the general welfare of the United States, but were imposed for the benefit of a particular class of individuals, namely, the producers of the various specified agricultural commodities who conform to the conditions laid down in the Act;

(3) Said Act violates the 5th Amendment to the Constitution since the so-called processing taxes constitute the deprivation of the property of one class of citizens, namely, the processors of the specified commodities, without due process of law, in that such processing taxes constitute the taking of the property of this class of citizen, not for a public purpose but for a private purpose, to-wit, the payment of gratuities or bounties to another class of person, namely, the producers of the designated agricultural commodity, and particularly since this taking is without just compensation.

(4) Said so-called processing taxes levied under the Act are taxes only in name and not in fact. They constitute merely an exaction or imposition by Government for the purpose, not of raising revenue for support of the government, but of raising prices for farm products and adjusting farm income.

(5) Said Act further violates the Constitution since it makes a delegation of legislative power to the Secretary of Agriculture without the fixing of clear and adequate standards, in the following particulars:

Congress has illegally delegated to the Secretary of Agriculture the power to initiate the tax, to determine the commodities taxed, to terminate the tax, to fix the tax rate, to fix the amount of rental and benefit payments, to expend the proceeds of the tax; and that Congress has otherwise illegally delegated its authority, and the exercise of such power by the Secretary of Agriculture conflicts with the separation of powers into the three departments of government made by the Constitution.

(6) Said act delegates to an administrative officer legislative powers conferred exclusively on Congress by Article 1, Section 1; Article 1, Section 8, Clause 18; Article 11, Section 1; Article 1, Section 7, Clause 1; and Article 1, Section 9, Clause 7 of the Constitution of the United States, by giving said Secretary the right (1) to select the basic agricultural commodities to be taxed; (2) to fix the rate and change the rate of said tax (3) to determine the duration of same; (4) to make exceptions and exclusions from the operation of said tax, and (5) for other reasons.

(7) The power of said Secretary to pay out the proceeds of said taxes without any appropriation by Congress violates Article 1, Section 9, Clause 7, of the U. S. Constitution and the Fifth Amendment thereto, because no basis of fact or specific findings are required to be found by said Secretary to impose the said tax and no judicial review is provided.

(8) The said taxes, if construed as directed, violate Article 1, Section 9, Clause 4, and Article 1, Section 2, Clause 3 of the Constitution of the United States, because not apportioned according to population.

(9) The said taxes are not excise taxes and are not uniform throughout the United States, as required by Article 1, Section 8, Clause 1.

(10) The said alleged taxes cannot be levied under Article 1, Section 8, Clause 3, regulating commerce; that the production of commodities is not interstate commerce and cannot be regulated by Congress.

XVIII.

That on June 18, 1935, there was passed by the House of Representatives of the United States a Bill (H. R. 8492) entitled "A Bill to Amend the Agricultural Adjustment Act, and for other purposes," containing a provision adding to the Agricultural Adjustment Act a new section designated "Section 21," the relevant portions of which read as follows:

"Sec. 21. (a) No suit or proceeding shall be brought or maintained in, nor shall any judgment or decree be entered by, any court for the recoupment, set-off, refund, or credit of, or on any counterclaim for, any amount of any tax assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment. Except pursuant to a final judgment or decree entered prior to the date of the adoption of this amendment, no recoupment, set-off, refund, or credit of, or counterclaim for, any amount of any tax, interest, or penalty assessed, paid, collected, or accrued under this title prior to the date of the adoption of this amendment shall be made or allowed. The provisions of this subsection shall not apply to (1) any overpayment of tax which results from an error in the computation of the tax, or (2) duplicate payments of any tax, or (3) any refund or credit under subsection (a) or (c) of section 15 or under section 17.

(b) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claims pursuant to the provisions of law made applicable by section 19 may be reserved in the court's order."

That said Bill was sent to the Senate of the United States, where the said Section 21 was altered and modified to read as follows:

"No recovery, recoupment, setoff, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue, or in the case of a judicial proceeding establishes in such proceeding (1) that he has not included such amount

in the price of the article with respect to which it was imposed, or of any article processed from the commodity with respect to which it was imposed, that he has not collected from the vendee any part of such amount, and that the price paid to the producer was not reduced by any part of such amount, or (2) that he has repaid such amount to the ultimate purchaser of the article, or in case the price paid to the producer was reduced by such amount, to such producer; nor shall any judgment or decree be entered by any Federal or State court for damages for the collection thereof, unless the claimant establishes the foregoing facts, in (1) or (2) as the case may be, in addition to all other facts required to be established. * * * * * "

XIX.

That, in the event that the said Bill amending the Agricultural Adjustment Act, as set forth above, is in either form enacted by Congress and becomes a law, the plaintiff will have no adequate remedy at law to sue for the refund or processing taxes or to litigate before this court or any other tribunal the question of the legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of processing taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them, in that said Senate modification imposes onerous conditions which cannot be complied with because the facts are incapable of ascertainment; that the purported right to sue for a refund for the amount of tax not passed on is purely illusory in that an error in computation of one (1¢) cent in the amount claimed will result in the loss and forfeiture of

the entire amount, even though said amount be several million dollars; that the prices of hogs processed by plaintiff and of the products dealt in by plaintiff are set by competition, in open and free markets, said prices fluctuating daily and in some cases hourly and the ascertainment of the part of any processing tax not passed back to the producer or on to the consumer is an impossibility.

XX.

That there is now pending before Congress H. J. Res. 348, section 2 of which provides:

"Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever heretofore or hereafter commenced, upon any bond, note, certificate or indebtedness, Treasury Bill, or other similar obligation for the repayment of money or for interest thereon made, issued, or guaranteed by the United States or upon any coin or currency of the United States or upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver, is withdrawn."

Thus if said joint resolution be passed subsequent to the enactment of any amendment to said Act purporting to reserve to a taxpayer the right to sue for a refund, the plaintiff asserts that, because of the broad language used in said joint resolution, it may be construed to withdraw any such right, in which event, the plaintiff will be remediless if said joint resolution be constitutional.

XXI.

That the amount of processing tax payable by plaintiff on account of hogs slaughtered at its said Los Angeles plant for the month of June, 1935 is $15,789.69, and that plaintiff shortly will receive from the defendant a demand in writing that plaintiff pay said amount to defendant; that if such amount be not paid, said statute provides that a penalty of five per cent (5%) be added to said amount and that interest be added at the rate of one per cent (1%) per month thereafter; that plaintiff can not incur the risk of non-compliance with said demand, in the absence of injunctive relief, because, in addition to imposing said penalties and interest, defendant will attach, distrain, or levy on the property of plaintiff, thereby irreparably injuring its business, good-will, and credit, and subjecting it to a multiplicity of suits; and plaintiff believes and therefore states that processing taxes for the month of July, 1935, and thereafter will exceed the sum of ten thousand dollars ($10,000.00) per month.

That, if plaintiff fails to pay said processing taxes when due, it and its officers will be subject to heavy criminal penalties as provided in Section 1114 (a) of the Revenue Act of 1926 (44 Stat. 116; U. S. C. Title 26, Sec. 1265) and Section 19 (g) of said Agricultural Adjustment Act as amended, unless protected therefrom by the injunctive process of this Court.

XXII.

That, aside from the invalidity of the said Act, the processing taxes which have been assessed and collected since January 19, 1935, were and the processing tax which is now being asserted against the plaintiff is, erroneous and illegal in that the rate of the tax since January 19,

1935, has not conformed and does not now conform to the alleged standard or formula which Congress laid down in the Act for the determination of the rate and that such rate exceeds the lawful rate which should be applied in accordance with said alleged standard or formula; that in said Act it is provided that the rate of the processing tax shall equal the difference between the current farm price for the commodity and the fair exchange value of the commodity and that the Secretary of Agriculture shall adjust the rate from time to time to conform to such alleged standard or formula; that the prevailing rate of the processing tax, to-wit: $2.25 per cwt, now exceeds and has exceeded since January 19th, 1935, the difference between the current farm price and the fair exchange value as calculated from statistics compiled by the Department of Agriculture; that the alleged fair exchange value of hogs, the alleged current farm price for hogs, and the excess of the alleged fair exchange value over the alleged current farm price as so calculated are as follows:

1935	Alleged Fair Exchange Value or Pre-war Parity Farm Price for Hogs	Alleged Farm Price for Hogs	Excess of Pre-war Parity of Alleged Farm Prices Over Alleged Actual Prices
January	$9.10	$6.87	$2.23
February	9.17	7.10	2.07
March	9.17	8.10	1.07
April	9.17	7.88	1.29
May	9.17	7.92	1.25
June	9.17	8.36	0.81

and that the defendant will continue to collect the processing tax at the illegal rate of $2.25 per cwt. from plaintiff under threat of distraint of plaintiff's property unless he is enjoined therefrom by this Court.

XXIII.

The plaintiff is ready, able and willing, and hereby offers and agrees that in the event the injunctive relief herein prayed for is granted, it will deposit, at such time and in such manner as this Court shall direct, the said sums claimed to be due from the plaintiff for processing taxes assessed against it for the month of June, 1935, and the plaintiff further offers and agrees that at the end of each month hereafter it will file processing tax returns with the defendant as required by existing laws and regulations and that as and when processing taxes under said returns become due and payable according to existing laws and regulations or any extension lawfully granted to the plaintiff, it will deposit the amount of such taxes in such manner as the Court may direct, all such deposits to abide the final decree in this cause.

WHEREFORE, plaintiff being without a plain, certain and adequate remedy at law and being able to obtain relief only in a court of equity, prays:

(1) That a writ of subpeona be issued to the defendant requiring him to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived;

(2) That a temporary, as well as preliminary, injunction be issued and granted by the said Court to the plaintiff against the defendant, after notice and hearing if

required by said Court, enjoining the defendant until the final hearing of this cause or until further order of this Court from collecting or attempting in any manner to collect from the plaintiff, whether by lien or notice of lien or jeopardy or other assessment, any processing taxes under or pursuant to the said Agricultural Adjustment Act, and any interest or penalty on account of plaintiff's failure to pay any such processing tax; from levying upon or distraining, or in any way, interfering with the manufacturing plant, inventory, cash on hand, bank account or other property of the plaintiff on account of the nonpayment of said processing taxes now due or hereafter to become due in accordance with the terms and provisions of the said Agricultural Adjustment Act; and from hereafter enforcing or collecting or attempting to enforce or collect any penalties against the plaintiff for the nonpayment of said taxes from the date of the issuance of the said temporary injunction until the final decree of this Court in this cause;

(3) That, on the final hearing of this cause, the said Agricultural Adjustment Act entitled

"An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes"

and the Acts amendatory thereof, and supplemental thereto, be declared unconstitutional and void as violative of the Constitution of the United States and that the defendant be permanently enjoined and restrained from

enforcing the same and from collecting or attempting in any manner to collect processing taxes or penalties against the plaintiff pursuant to the terms of said Act;

(4) And the plaintiff prays for all other relief agreeable to equity and good conscience.

GIBSON, DUNN & CRUTCHER,

By: J. C. MacFarland

Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

G. M. COCKLE being by me first duly sworn, deposes and says: that he is the Vice-President of ARMOUR & COMPANY, the plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint and Petition for Injunction and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

G. M. COCKLE

Subscribed and sworn to before
me this 2nd day of August, 1935.

Mary S. Alexander (Seal)
Notary Public in and for the County
of Los Angeles, State of California.

EXHIBIT A.

REPORT NO. 1011.

"The sections of the bill which deal with the imposition of processing taxes have been altered in several important particulars. These taxes, while levied upon processors, have been passed on to the consumer and actually paid by him. Consequently it has been found desirable to guard against the possibility of recovery of taxes accrued to or paid by the processors prior to the date of the adoption of these amendments, should such taxes for any reason be held invalid, by withdrawing the consent of the United States to be sued, and withdrawing jurisdiction from all courts to entertain such suits. * * *

The declaration of policy in the Agricultural Adjustment Act has as its objective the reestablishment of prices paid to farmers at a level that will give agricultural commodities a current purchasing power equivalent to that of the base period. Section 1 (a) of the bill amends this provision of the act to provide that in the case of all commodities for which the base period is the pre-war period (August 1909 to July 1914), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This provision is intended to give the Agricultural Adjustment Administration a more adequate standard for determining parity prices. The present

method of calculation is composed of an index of prices for goods which farmers buy in relation to the pre-war level and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160 to 170 per cent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers, may be expected to give parity standards approximately 5 percent higher than at present * * * *

"Before exercising any of the powers granted with respect to any commodity, the Secretary must determine that the current average farm price of the commodity is, at the time of such determination, below the fair exchange value thereof, or that the average farm price of the commodity for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, is likely to be less than its fair exchange value. The Secretary must undertake an investigation concerning the existence of these circumstances whenever he has reason to believe that they exist. If he finds, upon the basis of the investigation, that they do exist, he is directed to undertake the exercise of such of the powers conferred by section 8 as are administratively practicable and best calculated to effectuate the declared policy. The Secretary is directed to cease exercising such powers after the end of the marketing year current when he determines, after investigation, that the circumstances described above no longer exist, except (as provided in the committee amendment) insofar as the exer-

cise of any of such powers is necessary to carry out obligations assumed by him prior to his proclamation discontinuing the exercise of the powers * * * *

"Section 9 (b) of the present law also contains a provision allowing the Secretary of Agriculture, when he finds that the effect of the tax is to cause such a reduction in domestic consumption as to cause an accumulation of surplus stocks of a commodity or its products, or a depression in the farm price, to set a rate which will prevent such consequences. Although it is clear that Congress intended to provide for such a reduction in the rate of tax even when the existing rate is higher or lower than the difference between the current average farm price and the fair exchange value, or in the event that these circumstances continued even after one such reduction, the langauge at present used does not explicitly state that such adjustments are permissible. The proposed amendment to section 9 (b) expressly authorizes reductions under these circumstances, and also empowers the Secretary to increase a rate of tax which has been theretofore reduced. An increase in rate is, of course, contingent upon the Secretary's finding that such increase will not cause a recurrence of stock accumulations or price depressions. After such a finding the processing tax is to be at the highest rate which will not cause such accumulation of stocks or depression in price, but it cannot be higher than the difference between the current average farm price and the fair exchange value."

EXHIBIT B.

(a) "Achieving a Balance Agriculture," issued August, 1934:

"CHAPTER VIII—PROCESSING TAXES; WHAT FOR AND WHO PAYS THEM?

"By the end of March, 1934, the Agricultural Adjustment Administration had disbursed a total of $179,702,-687. By the end of 1935 it anticipates a total disbursement of about $840,000,000.

"Where is the money coming from?

"The adjustment program is being financed largely by the receipts from processing taxes, collected by the Bureau of Internal Revenue from the first domestic processor of each of the basic commodities—the miller, the cotton textile manufacturer, the meat packer, and so on. As was mentioned in Chapter VI, in the consumer's interest the tax was limited by law to the amount necessary to raise the current farm price of the commodity to the 'parity' price.

"In some cases, where the application of the full amount of such tax would cut down consumption and therefore pile up new surpluses, the Secretary of Agriculture is permitted to fix the tax at a lower level. This has been done in connection with the corn-hog program.

"Since the prices of competing commodities largely determine how much of each will be bought, the Secretary also is allowed to place compensating taxes on commodities whose use is likely to replace that of commodities bearing a processing tax. Compensating taxes are now being levied on jute and paper where they come into competition with

cotton. Similar taxes are permitted on imported articles so as to maintain the usual competitive relationship between the use of imported and domestic goods.

"Who pays these taxes?

"Do the miller, the textile manufacturer, the packer, pay them?

"Do they pass them forward to the consumer?

"Or do they pass them back to the producer?

"SUPPLY AND DEMAND CONDITIONS GOVERN

"Who pays the processing tax depends on the supply and demand conditions for a given commodity.

"Demand for a product may be either elastic or inelastic. It is inelastic when about the same amount of the product is bought, no matter whether the price is high or low. It is elastic when a rise in price is immediately followed by a drop in quantity sold.

"When demand is inelastic, the processing tax is likely to be paid by the consumer, since he will continue to buy even if the whole tax is added to the price of the goods.

"When demand is elastic, on the other hand, the consumer may pay less than the full amount of the tax if the same quantity of the product is put upon the market as before. In such cases, the producer and the distributor each try to make the other absorb the tax; while supplies continue to be excessive, it is more likely to be passed back to the producer in the form of prices lower than they would be if shipments were smaller.

"Experience with the processing taxes seems so far to indicate that in the case of cotton goods and of wheat

flour the tax has been consistently paid by the consumer. This is partly because both are nonperishable commodities which can be stored and thus do not have to be thrown upon the market as soon as they are produced; partly because they are sold abroad as well as at home, which means that demand from abroad tends constantly to bolster the price at home with domestic prices almost always related to world prices; and partly because they are regarded by the public as necessities and hence domestic demand for them is highly inelastic.

"EFFECT OF TAX ON HOG PRICES

"In the case of hogs, on the other hand, the effect of the tax has been varied. Three distinct periods are noticeable between October 1933 and May 1934. Demand for pork is highly elastic. Consumers buy a great many pounds of pork products if prices are low, and correspondingly fewer pounds as prices rise, so that the annual amount spent on it by the public remains just about the same. In view of this, the processing tax has been applied gradually, beginning at 50 cents per hundred pounds live weight in November 1933 and rising to $2.25 in March, 1934.

"From October to January, the farmer was shipping a very large supply which the consumer would not have accepted had the prices been put up too much. Price-raising effects of the Administration's emergency hog-buying program, which eliminated over 6 million pigs and light hogs from the farms during the autumn, were not

felt during that period because those pigs, if left on the farm, would not have been sold until later. During those months, many farmers assumed that they themselves were paying part of the tax, but in no case has it ever been contended that they paid all of the tax. Such a situation is very different from the McNary-Haugen plan for raising prices, under which the farmer would have paid all of the cost of contributing the equalization fee.

"After January 1934, the elimination of the pigs began to be felt; the curtailed supply turned a buyers' market into a sellers' market, and from January to March the tax appeared to be generally paid by the consumer. Prices to farmers showed a distinct rise, from $3.06 per hundred pounds on January 15 to $3.88 on March 15.

"By the end of March, the supply situation began to reverse itself; as shipments increased, prices to farmers declined again, with a pronounced drop in price when an unusual number of shipments were forced on the market by the drought.

"Twice, during the days immediately following the raising of the tax on the first of February and on the first of March, the packers absorbed a part of the tax, for they were unable to raise wholesale prices of pork as fast as the price of hogs plus tax was going up. Thus during most of the period after processing taxes were levied, farmers received more than they did in the corresponding period a year before in price alone, and, in addition, they got their benefit payments.

"TAX MONEY ENDS UP IN FARMERS' POCKETS

"But, from one point of view, the question of who pays the tax is beside the point. Even if it could be shown that the farmer pays part of the tax, that would not in itself mean that the farmer is not gaining great advantage from it. If there were no tax, there could be no benefit payments. If there were no benefit payments, no plan for voluntary control of production would be feasible. If there were no control of production, supplies would be excessive and prices would continue at ruinously low levels.

"The farmer who thinks he is paying part of the tax should do some figuring. He should figure what price he would be getting if there were no adjustment program. Then he should figure what his total cost of production would be if he were making no reduction in the number of pigs raised, take that figure from his total income and thus get at his net return if he were not operating under the program. He should compare these figures with his situation under the adjustment program. He would find that three factors are contributing to his total income—his volume of production, his market price, and his benefit payment. He should subtract from this total income his cost of production, which will be less in proportion as his production is less. He can then see the difference between his net return under the program and what his net would be if there were no program.

"Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every

dollar collected in processing taxes goes to the farmer in benefit payments. In addition his market price is higher due to production adjustments. Except for money spent to remove surpluses from the market, the cash is sent straight to the farmers forming the county production control associations.

"What counts, after all, is not who pays the tax but who gets the income from it and who gets the advantage of the whole program.

"CONSUMERS' PRICE INFORMATION PUBLISHED

"Are the processing taxes ever paid more than once?

"Whenever any tax is levied there is always a danger that in the course of being passed on it may be piled up or pyramided, so that the ultimate consumer has to cover it several times. There is the possibility that retailers may reap excess profits under the excuse that the tax is forcing prices up.

"In order to prevent this and other abuses of the consumer in the case of processing taxes, a Consumers' Counsel has been established in the Agricultural Adjustment Administration. This office issues a semi-monthly bulletin called the Consumers' Guide, which follows price movements and the elements which make them up, so that the consumer may know just how much the tax really does add to the price he pays.

"The April 9, 1934, issue of the Consumers' Guide shows the part played by the processing taxes in prices of clothing, bread, and so on. According to the Consumers' Counsel's figures, the tax does not directly represent more than one-half cent in the 7.9 cent average price of

a one-pound loaf of bread. It does not directly represent more than 3.4 cents in the price of a woman's cotton dress, nor more than 6.2 cents in the price of a man's work pants. It does not directly represent more than 7.6 cents in the price of a sheet, 3.2 cents in that of a bath towel, or 1.3 cents in that of a yard of unbleached muslin. Further increases have been due to increased labor costs and other factors, but as these figures indicate, increases in prices directly due to the processing taxes alone are relatively small.

"SMALL PRICE RISE TO CONSUMER MEANS MUCH TO FARMER

"It is worth remembering that a small percentage rise in the consumer's price usually is accompanied by a much greater percentage rise in the farmer's price. This is because the farmer's share in retail price is usually very low and because costs of distribution usually remain about the same no matter what the price is. For example, if the consumer has been paying $1 for a bushel of potatoes, the farmer's share likely has been 35 cents. If the price paid by the consumer rises to $1.10, the farmer receives 45 cents instead of 35 cents. The increase in his price is 29 percent, while the consumer pays only 10 percent more. If the consumer pays $1.35 a bushel, the farmer will receive 70 cents, or double his former price, while the consumer's price has increased only 35 percent.

"Something like this is what happened during 1933 with respect to wheat. In March 1933, the consumer paid an average of 3 cents a pound for flour, of which the farmer got only 0.8 cent. In March 1934, the consumer

paid an average of 4.8 cents a pound, of which the farmer got 2.3 cents.

"A moderate decrease in the consumer's price may almost wipe out the farmer's margin, as it did in wheat early in 1933. Conversely, a moderate increase in what the consumer pays, such as occurred later in 1933, may change the farmer's prospects from ruin to a chance to make a reasonable living.

"PROGRAM DEPENDS UPON TAX

"From what has been said above, it will be clear to what extent the voluntary production control programs depend on the processing taxes. It will be seen that the tax has a double function: It not only supplies the funds which are being used to increase the co-operating farmers' income; it is the essential instrument by which production control is secured.

"In a sense, the processing tax and benefit payment may be considered the farmer's tariff, calculated to place him on more equal footing with the protected industrialist producing goods bought by farmers. Because large portions of our farm crops are ordinarily sold at world prices, import duties give little protection to the producers of these crops. As long as the United States maintains a high tariff protecting the prices of many industrial products which the farmer has to buy, the processing tax is needed to give an equal protection to the prices of the farm products which the farmer sells.

"Farmers who understand the manner in which the processing tax operates will be reluctant to abandon so practical and effective a means of gaining economic equality."

(b) "Corn-Hog Adjustment," issued January, 1935:

"INCIDENCE—WHO PAYS THE PROCESSING TAX?

"The processing tax may affect producers' income from corn and hogs in two general ways. Collection of the tax may operate to increase producers' income directly: (1) By causing consumers to pay more for the volume of products offered—possibly to the full extent of the tax rate—than they would pay if no tax were in effect; or (2) by causing processors and other in-between handlers to reduce to some extent the unit margins held out of the consumers' dollar for each pound or bushel of commodity handled. If either effect were produced the processing tax would tend to increase return from the commodity before any adjustment in production was made.

"Or collection of the processing tax may affect producers' income indirectly. Funds derived from the tax collections are used to provide benefit payments to producers who participate in adjustment of production. Under the adjustment program, supply is brought into better balance with effective demand and the value of the commodity tends to rise. Rising commodity values mean increased return to farmers. Although production adjustment itself is directly responsible for the increase in farmers' income in this case, the processing tax may be given credit indirectly because it provides the funds for the benefit payments. Without the benefit payments or some similar means of rewarding cooperating producers, there would not be general voluntary participation in the corn-hog programs.

"It is not easy to make a thorough and accurate analysis of the actual effects of the processing tax to date on consumers' expenditures, handlers' margins, or return to producers, particularly with respect to hogs, because of day-to-day and week-to-week variations in hog marketing, changing trends in consumers' incomes and fluctuations in other factors affecting market value of farm commodities. It is easy to be misled by changes in the market value of corn and hogs, which are due to other things than the collection of the processing tax.

"For example, a seasonal increase in hog marketings such as normally occurs in the early winter and late spring usually results in a proportionate decline in hog prices. If a processing tax were put into effect at such a time—as was the case with Hogs in November 1933—it could be rather persuasively argued that the tax had been responsible for the decline and that, therefore, producers were being made to "pay" the tax. This, however, might not be true. In spite of a temporarily lower price, the total money being paid by packers—the price for hogs and the tax on the right to slaughter—actually might be larger than normal with respect to the increased volume of hog marketings, and the cooperating farmer would receive the market price plus the benefit payments paid out of the proceeds of taxes.

"On the other hand, the opposite impression would result if a processing tax were put into effect during a seasonal decline in hog marketings, such as normally occurs in the early spring and late summer and which usually results in considerably stronger hog prices. That is, it would seem to show that the consumer was being made to spend more in total for hog products than before

and in effect, therefore, was being made to bear a part or all of the tax. However, this, too, might not actually be true in all respects.

"EFFECT OF PROCESSING TAX UPON PRODUCERS.

"How does the hog processing tax affect producers?

"Studies thus far indicate that the production adjustment program, the benefit payments, and the processing tax are resulting in substantially higher hog prices and in a larger total income. The increase thus far primarily reflects the adjustment in production effectuated by the emergency and supplemental purchase of hogs and hog products during the latter part of 1933 and early 1934. The 1934 corn-hog production adjustment program has only recently begun to affect hog marketings.

"It is sometimes argued that the producer pays the tax because he no longer gets, in the form of an open market price, all of the total amount paid by the processor for each hog slaughtered. This statement, however, has no real significance so long as the combined income from both the open-market price and the benefit payment is larger than before. To say that the producer pays the processing tax when farm income has been increased by a program financed by tax collections is to confuse the meaning of the word 'pay.'

"In a situation in which the producer paid the processing tax in the true sense, it would be found that the producers' total returns from the new production and sale of hogs would be less than if there were no adjustment-tax program and if no processing tax were in effect.

"Only the nonsigner who does not participate in the adjustment program can be said to sustain any disadvantage by reason of the processing tax. He does not share in the benefit payments made out of the proceeds of taxes. The nonsigner is benefited to some extent, however, by the rise in the open-market price which results from adjustment of production.

"What is the effect of the corn processing tax?

"The processing tax of 5 cents per bushel on field corn apparently is being absorbed largely by processors. The corn processing tax rate is nominal and applies only to the amount of corn processed in commercial and industrial channels. This amount is equal to about 10 percent of the annual corn crop.

"EFFECT OF THE PROCESSING TAX UPON CONSUMERS

"Does the consumer, in effect, pay the processing tax on hogs?

"This question should be divided into two questions if it is to be properly considered.

"Has production adjustment, which benefit payments have thus far encouraged, caused the usual increase in the retail price of pork and lard which in the past has resulted from a like change in supply? And, in addition, has the processing tax been handled by processors and distributors so as to cause a larger-than-usual increase in the retail price of pork and lard? That is, has the tax caused consumers to spend more for pork and lard than otherwise might have been spent for an identical adjusted supply on which no tax was in effect?

"Studies indicate that the adjustment in production under the Act has caused the retail price of pork and lard to increase to an extent which is about proportionate with the usual increase expected from a similar change in supply. After allowance for the increase in consumers' incomes during the past 2 years, studies show that the higher retail prices are fully reflecting smaller hog supplies and higher hog prices.

"It appears that consumers as a group are bearing the hog processing tax mainly in the sense that they are getting a more moderate supply of pork and lard for an expenditure which is proportionate with but not materially in excess of past total expenditures at a similar level of income. An individual consumer who is buying the same amount of hog products as formerly, of course, really is spending relatively more than before the adjustment in supply.

"The hog processing tax of $2.25 per hundredweight is the equivalent of an average of between 2½ cents and 6 cents per pound on the products from 100 pounds of live hogs, depending upon the cut and quality. The price equivalent of the hog processing tax represents a percentage of the total retail price on hog products that is larger than the percentage that the cotton and wheat processing taxes are, of the respective retail prices of wheat products and cotton goods. But this is because more in-between costs and margins enter into the processing and handling of wheat and cotton products than into the processing and handling of hog products. With respect to the open-market prices of the several unprocessed commodities, the wheat, cotton, and hog processing taxes all bear a similar relationship.

"EFFECT ON PROCESSORS AND OTHER HANDLERS

"Processors are the persons who actually pay the tax over to the Government out of the proceeds of their sales of products, but it is generally recognized that this does not necessarily mean that processors really bear the tax. If processors were paying the tax in the true sense, it would be found that their charges per hundred weight of hogs processed had been proportionately reduced with the imposition of the initial rate of the tax and with each increase thereafter. Thus at the present time, it would be found that processors' unit charges were smaller by an average of approximately $2.25 per hundredweight of live hog handled than before the tax was put into effect.

"A review of processors' gross margins since November 1933 indicates that while they have varied from month to month, these margins have widened to some extent with each increase in the tax rate. After the processing tax is subtracted from these gross margins, it appears that the average net margin on which the processor actually operates has tended to decline somewhat during the first marketing year the processing tax has been in effect. However, it cannot be definitely determined yet whether this is a temporary situation due to spirited bidding for hogs to put in storage in view of the short supply ahead or whether it is a more permanent result of the processing tax and other features of the agricultural adjustment program as it applies to corn and hogs.

"It is not expected, however, that the processors' net margin would absorb a large part of the tax, since this margin in total normally averages between $1.50 and $2.00 per hundredweight of hogs, live weight basis, as compared with the processing tax of $2.25 per hundredweight.

"PROCESSORS" GROSS MARGINS LESS

"When it comes to the aggregate of processors' margins, that is, unit margin times the supply of hogs handled, a reduction has taken place. It is this reduction which is reflected in an increase in the percentage of consumers' expenditures going to producers.

"In the case of handlers other than processors, such as transportation agencies and retail distributors, it appears that on the average, unit handling margins have tended to increase rather than decrease but that the increases which have occurred largely reflect increases in operating costs. Increases in unit margins have been offset to some extent by the reduction in the total volume of hogs and hog products handled.

"CONCLUSION

"Because the processing tax is instrumental in one way or another in raising food prices, it is liable to be regarded with considerable disfavor by those who take a short-time view of the desirability of cheap food regardless of whether farmers get a fair return. In the long run, however, the desirable price is that price which will

yield a fair return to the farmer, enabling him to continue to produce adequate supplies of agricultural products. If farming is a losing proposition over an extended period, eventually total production falls below a desirable level and consumers must then pay extremely high prices for food. Balanced production is important to the permanent welfare of consumers.

"Among producers there is a tendency to feel that if the processing tax were removed the open market price might be higher by at least a part of the tax and that the total income from hogs would be practically as large as when the tax was in effect. In the case of hogs, this might prove to be true for a time. However, without the processing tax or some other means of raising revenue, there would be no benefit payments and none of the price-raising effects which result from production adjustment. Without an adjustment program, hog production would be likely to increase to high levels again and both price and total income would fall."

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

To NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, and to his deputies, officers, servants, and agents:

WHEREAS, in the above named cause it has been made to appear, by the verified bill of complaint and petition of plaintiff filed herein, that a restraining order preliminary to hearing upon application for a preliminary injunction is proper because of the allegations of immediate and irreparable injury, loss, and damage set forth in said bill of complaint and petition, and that prima facie the plaintiff is entitled to an order restraining temporarily the said defendant, Nat Rogan, as Collector of Internal Revenue for said Sixth Collection District of California, and his deputies, officers, servants, and agents, from doing the acts therein complained of,

NOW, THEREFORE, on motion of the plaintiff, by its attorneys, IT IS ORDERED that said Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, appear before the District Court of the United States, Southern District of California, Central Division, before Honorable Paul J. McCormick, Judge of said Court, at his Courtroom, in the Federal Building in Los Angeles, California, in said District, on the 9th day of August, 1935, at the hour of 10 o'clock A. M. of that day, then and there to show cause, if any

there may be, why the preliminary injunction prayed for in said bill of complaint and petition and in said motion requested, should not issue.

IT IS FURTHER ORDERED that copies of this order certified under the hand of the Clerk and the seal of this Court be served upon defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and that such copies, together with said bill of complaint and petition, be served upon said defendant on or before the 5th day of August, 1935.

This order signed and issued this 3rd day of August, 1935, at 9:50 o'clock A. M.

By the Court.

PAUL J. McCORMICK
Judge

[Endorsed]: Filed Aug. 3, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

OBJECTIONS TO THE GRANTING OF A PRELIMINARY INJUNCTION.

COMES NOW the defendant Nat Rogan as Collector of Internal Revenue for the Sixth district of California, in the above entitled cause, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, alleges:

I.

That the defendant is a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II.

That the duties of said defendant are to collect taxes levied under the Internal Revenue Laws of the United States.

III.

That the Complaint in the above entitled case seeks to enjoin the defendant from collecting taxes levied under and by the Internal Revenue Laws of the United States.

IV.

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the

purpose of restraining the assessment or collection of a federal tax.

V.

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI.

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

DATED: This 6th day of August, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: Received copy of the within document Aug 6 1935 Gibson, Dunn & Crutcher Per A

Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

[Title of Court and Cause.]

MOTION TO DISMISS

COMES NOW Nat Rogan, Collector of Internal Revenue for the Sixth District of California, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant U. S. Attorney for said District, and moves the Court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I.

That the Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complianant has a plain, adequate and complete remedy in the ordinary course at law.

II.

That the United States of America is a real party in interest and it may not be sued without its consent.

III.

That there is no actual controversy between complainant and defendant, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV.

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States, and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V.

That the proceeding attempted to be instituted by this complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney.

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney.

Attorneys for Defendant.

[Endorsed]: Filed Aug 6 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 9th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, Collector, etc.	)	
Defendant.	)	

This cause coming on for hearing on Order to Show Cause, filed August 3rd, 1935, directed to Nat Rogan, Collector, to show cause why Preliminary Injunction prayed for in the Bill of Complaint should not issue, etc.; and, for hearing on Motion of defendant for an Order of the Court dismissing proceeding, pursuant to Notice filed August 6th, 1935;

J. C. McFarland, Esq., appearing for the Petitioner herein, makes a statement, following which Peirson M. Hall, U. S. Attorney, appearing for the Government, makes a statement, and Clyde Thomas, Assistant U. S. Attorney, also of counsel for the Government, argues to the Court, at this time, and Eugene Harpole, Esq., being present and appearing specially for the Bureau of Internal Revenue, the Court makes a statement, and orders Preliminary Injunction granted and Motion to dismiss denied. Exception noted.

[Title of Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard this 9th day of August, 1935, before Hon. Paul J. McCormick, Judge of the above entitled court, on the application of said plaintiff for a preliminary injunction upon plaintiff's verified complaint and petition for injunction, due notice of the hearing of which application was given to defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and on the written motion of defendant to dismiss the bill of complaint and petition for injunction; and after hearing counsel for the respective parties and the matters having been submitted to the Court for its consideration, and it appearing to the Court, and the Court finds that it is true, that certain processing taxes are due and payable from the plaintiff under the terms of said Agricultural Adjustment Act hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act, that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition, for the reason that there is immediate danger that said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, will proceed under said Act to collect from said plaintiff said taxes and in so doing will distrain, levy upon, and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing the plaintiff an irreparable

loss of such property and the goodwill of plaintiff's business, likewise mentioned in said bill of complaint and petition, and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy, and adequate remedy at law in the premises; that if said restraining order is not so issued, there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act, and that for all these reasons a preliminary restraining order should issue against the defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, as prayed for in said bill of complaint and petition,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1st. That said defendant, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, his officers, agents, servants, employes, and attorneys, and those in active concert or participation with him and who shall, by personal service or otherwise, have received actual notice hereof, shall be and they are and each of them is hereby enjoined and restrained from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff, Armour & Company, a corporation, any processing taxes now due from and payable by plaintiff under and pursuant to the said Agricultural Adjust-

ment Act adopted by the Seventy-third Congress of the United States, and being

"An act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of the emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes,"

which Act was approved on May 12, 1933, and all acts amendatory thereof; from imposing, levying, assessing, demanding, or collecting or attempting to impose, levy, assess, or collect against or from the plaintiff any taxes hereafter to become due from and payable by plaintiff and arising under the terms of said Act on hogs processed by it; from imposing or collecting or attempting to impose or collect upon or from said plaintiff any interest or penalties on account of plaintiff's failure to pay any of said processing taxes payable by plaintiff under the force of the Act, whether now due or hereafter to become due from plaintiff; from imposing or filing or giving notice of intention to impose or file any lien upon the property of plaintiff, whether real or personal, because of the non payment by plaintiff of any of said processing taxes, whether now due or hereafter to become due from plaintiff under the Act; from levying upon or distraining or selling plaintiff's slaughter house, packing plant, the machinery and appliances therein contained and used in connection therewith, rolling stock, manufactured products on hand, stock in trade, choses in action, money on hand and money in bank or any of such property or any other property of plaintiff on account or by reason of such non-

payment of said or any of said processing taxes, whether now due or hereafter to become due from and payable by said plaintiff under said Act, all from the date of the issuance of this preliminary injunction until the final decree of the Court in this case or until further order of this Court;

2nd. This injunction is granted upon the condition that the plaintiff shall furnish security to the defendant, Nat Rogan, as Collector of Internal Revenue, as aforesaid, by undertaking with sufficient sureties, to be approved by the Court, in the penal sum of $17,370.00, conditioned that plaintiff will pay all said processing taxes assessed and charged against plaintiff under said Act, together with all costs assessed by the Court in the event it is finally decided this restraining order was improperly issued or this action is dismissed; provided that in lieu of such undertaking plaintiff shall have and is hereby given the option of depositing the said sum of $17,370.00 in lawful money of the United States with the Clerk of the above entitled Court, subject to like conditions; and upon the further condition that said plaintiff shall continue to file with said Nat Rogan, as said Collector of Internal Revenue, monthly returns on all hogs processed by it, as required by said Act, such returns to be made on the forms provided therefor by the said Collector of Internal Revenue; and file a bond or deposit with the Clerk the amount of the tax shown to be due by such return.

3rd. The Court, however, reserves the right to require additional security from plaintiff from time to time, as may seem to the Court necessary to protect the defendant, Nat Rogan, as said Collector of Internal Revenue, or to modify this order in any part or particular after notice to the parties hereto; and

4th. That the said motion of defendant to dismiss plaintiff's bill of complaint and petition for injunction is denied and defendant is allowed fifteen (15) days after notice hereof within which to answer said bill of complaint and petition for injunction.

Dated at Los Angeles, California, this 15th day of August, 1935.

By the Court.

PAUL J. McCORMICK
Judge of the said District Court

APPROVED AS TO FORM
CLYDE THOMAS
Asst. U. S. Atty.
Attorneys for Defendant.

Filed Aug. 15, 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

UNDERTAKING ON INJUNCTION

WHEREAS, the above named plaintiff has commenced the above entitled action and summons has issued therein, in the District Court of the United States, Southern District of California, Central Division, against the above named defendant, and whereas the said plaintiff has applied for and has been granted a preliminary injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described,

NOW, THEREFORE, Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and duly licensed to transact a general surety business in the State of California, in consideration of the premises and of the issuing of said injunction, undertakes, in the sum of seventeen thousand three hundred seventy dollars ($17,370.00), and promises to the effect, that in case said injunction shall issue the said plaintiff will pay to the said party enjoined all taxes chargeable against plaintiff on account of the matters and things described in said complaint, together with all costs assessed by the Court, in the event that it is finally decided that injunction was improperly issued or in the event that this action is dismissed, not exceeding, however, the total sum of seventeen thousand three hundred seventy dollars ($17,370.00).

IN WITNESS WHEREOF, the said Surety has caused its corporate name and seal to be hereunto affixed

by its duly authorized attorney-in-fact, at Los Angeles, California, on the 15th day of August, A. D. 1935.

MARYLAND CASUALTY COMPANY,

(Corporate Seal) By C. W. Keefer
Attorney-in-fact

I HEREBY APPROVE THE FOREGOING BOND
Dated: The 15th day of August, 1935.

Paul J McCormick
Judge

STATE OF CALIFORNIA,)
(SS:
County of Los Angeles.)

On this 15th day of August, A. D., 1935, before me, Frances B. Gray, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Keefer, known to me to be the Attorney-in-fact of the Maryland Casualty Company, the corporation that executed the within and foregoing instrument, and known to me to be the person who executed the within instrument on behalf of such corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Frances B. Gray (Seal)
Notary Public in and for the County of Los Angeles, State of California

My Commission Expires Jan. 6, 1938

[Endorsed]: Filed Aug 15 1935 R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE TEMPORARY INJUNCTION

TO ARMOUR & COMPANY, a corporation, plaintiff in the above entitled action, and

TO GIBSON, DUNN & CRUTCHER, its attorneys:

You, and each of you, will please take notice that the defendant above named will move the above entitled court, in the courtroom of the Honorable Paul J. McCormick, in the Federal Building, Los Angeles, California, on the 27 day of August, 1935, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the temporary injunction heretofore entered, on the grounds and for the reasons stated in said motion, copy of which is hereunto attached.

Dated: This 22 day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

[Endorsed]: Received copy of the within document Aug 22 1935 Gibson, Dunn & Crutcher Per A

[Title of Court and Cause.]

MOTION TO VACATE TEMPORARY INJUNCTION.

TO THE HONORABLE PAUL J. McCORMICK, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 15th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate, and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved ...., which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum

in excess of $1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plaintiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's Bill of Complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22d day of August, 1935.

Peirson M. Hall.
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas.
CLYDE THOMAS,
Assistant United States Attorney,
Attorneys for Defendant.

CT:ah

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman, Clerk. By B. B. Hansen Deputy Clerk

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Tuesday, the 27th day of August, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Armour & Company, a corporation,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C.
Nat Rogan, etc., et al.	)	
Defendants.	)	

The above and foregoing entitled and numbered causes coming before the Court, at this time, for hearing on Motions of defendants for Orders vacating and setting aside Temporary Injunctions heretofore entered, etc., pursuant to Notices filed August 22nd, 1935;

A. M. Randol is present and acts as the official stenographic reporter of the testimony and the proceedings, and the plaintiff in each of the above entitled causes being represented as follows, to-wit:

Geo. M. Breslin, Esq., appears for the plaintiff in Cases, Nos. Eq.-698-H and Eq.-708-J; J. E. Blum, Esq., appears for the plaintiff in Cases, Nos. Eq.-702-J, Eq.-703-H and

Eq.-719-C; W. Torrence Stockman, Esq., appears for the plaintiff in Cases, Nos. Eq.-710-H and Eq.-739-C; John C. Stick, Esq., appears for the plaintiff in Cases, Nos. Eq.-732-H and Eq.-733-M; Benjamin W. Shipman, Esq., appears for the plaintiff in Case No. Eq.-694-C; Attorneys Hibbard and Kleindienst appear for the plaintiff in Case No. Eq.-711-M; Leon Levy, Esq., appears for the plaintiff in Case No. Eq.-721-J; Leon Kaplan, Esq., appears for the plaintiff in Case No. Eq.-737-M; J. C. McFarland, Esq., appears for the plaintiff in Case No. Eq.-740-C; W. K. Tuller, Esq., appears for the plaintiff in Case No. Eq-741-J; and, Peirson M. Hall, U. S. Attorney, Clyde Thomas, Assistant U. S. Attorney, and Francis A. Le Sourd, Esq., Special Assistant to the U. S. Attorney General, all appearing for the respondents herein;

Now, at the hour of 11 o'clock a. m. counsel answer ready in all cases, whereupon, the Court orders hearing herein proceed; and

******(Argument of counsel)******.

At the hour of 4:55 o'clock p. m. the Court orders said Motions submitted for decision.

At a stated term, to-wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Friday the 30th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. MC CORMICK, District Judge.

Armour & Company, a corp.,	)	
Plaintiff,	)	
vs.	)	No. Eq.-740-C
Nat Rogan, etc.,	)	
Defendant.	)	

This is a motion to vacate a temporary injunction. The restraining writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the injunction.

It has been considered proper by the court, because of the absence of the other judges during the regular August vacation period of the court, that all of the motions to vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in Fisher Flouring Mills Co. v. Collector, etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that Court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the motion to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant.

[Title of Court and Cause.]

PETITION FOR RE-HEARING

TO Honorable Paul J. McCormick, Judge of the above entitled Court:

The petition of Armour & Company, a corporation, respectfully shows:

I.

That it has heretofore commenced a suit against the above-named defendants.

II.

That in the course of said suit and after due and proper showing, a temporary injunction was granted it, pending the determination and decision of said suit.

III.

That the decree granting the plaintiff such temporary injunction against any of the acts of the defendants in said injunction set forth, was made on or about the 9th day of August, 1935.

IV.

That thereafter, on or about the 30th day of August, 1935, your Honorable Court made and entered its Order dissolving said temporary injunction.

V.

That your petitioner states that the Order of your Honorable Court, so made and entered on or about the 30th day of August, 1935, is in error in the particulars set forth and specified in the attached Assignment of Errors.

Wherefore, your petitioner prays that a time and place be set by the Court for the purpose of hearing this petition and that, for such purpose, an Order to Show Cause should issue to defendants and their counsel, directing them to appear and show cause, if any they may have, why a re-hearing should not be had, and said Order dissolving the temporary injunction vacated, and said temporary injunction restored to its former full force and effect; and that your Honorable Court may make such other and further orders and decrees, during the hearing and after the hearing of the within petition, as to the Court may seem proper, and in accordance with the usages and precepts of equity.

Dated: September 9, 1935.

JOHN C. MACFARLAND
GIBSON, DUNN & CRUTCHER

By John C. MacFarland

Attorneys for Plaintiff, Armour & Company, a corporation petitioner herein.

It is ordered that said petition for rehearing be set for hearing on the 12th day of September, 1935 at 2 o'clock P. M. and that Notice of such hearing be given the defendant, or his attorney, not later than the 9th day of September, 1935.

Dated - Los Angeles, Calif, Sep. 9, 1935

Paul J. McCormick
Judge.

[Endorsed]: Received copy of the within Petition this 9th day of September, 1935 Peirson M. Hall, D. H. Attorney for Deft. Rogan. Filed Sep. 9 - 1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Thursday the 12th day of September in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Paul J. McCormick, District Judge.

ARMOUR & COMPANY a corporation,	)	
	)	
Plaintiff	)	No. 740-C
vs.	)	In Equity
NAT ROGAN, etc.	)	
Defendant	)	

These causes coming on for hearing on (1) Petition for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases, Nos. 698-H, 708-J, 710-H, and 740-C; George M. Breslin, Esq., appearing for the plaintiffs in cases, Nos. Eq. 698-H and Eq. 708-J; Benjamin W. Shipman, Esq., appears for the plaintiff in case No. Eq. 694-C; W. Torrence Stockman, Esq., appears for the plaintiff in Case No. Eq. 710-H; John C. MacFarland, Esq., appears for the plaintiff in Case, No. Eq. 740-C; and J. E. Blum, Esq., appearing for the plaintiffs in Cases, Nos. Eq. 702-J, Eq. 703-H, and Eq. 719-C; and Philip N. Krasne, Esq., appearing for the plaintiff in Case No. Eq. 737-M, Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock p. m. counsel answer ready in all matters; following which,

George M. Breslin, Esq., makes a statement, and

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to Motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p, m., George M. Breslin, Esq., argues to the Court in support of petitions for rehearing; after which,

At the hour of 2:30 o'clock p. m. Peirson M. Hall, Esq., argues to the Court in reply thereto.

At the hour of 3:10 o'clock, John C. MacFarland, Esq., makes closing argument in behalf of the plaintiffs; following which

At the hour of 3:15 o'clock p. m. J. E. Blum, Esq., makes a statement.

The Court now renders its oral opinion and orders that each Motion for rehearing be severally denied and exceptions allowed.

Upon Motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is order that Supplemental Bills of Complaint in Cases, Nos. Eq.-698-H and Eq.-708-J may be amended by interlineation.

[Title of Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

Comes now the plaintiff and with leave of Court files this, its supplemental complaint, and alleges:

I.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Section 21, subdivision (d) (1), and reading as follows:

"(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any over-payment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part

of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claims, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the Court. * * * *."

That by the enactment of said legislation plaintiff has been deprived of any adequate remedy at law to sue for the refund of processing taxes or to litigate before this Court or any other tribunal, the question of legality or constitutionality of said Agricultural Adjustment Act or of the assessment and collection of process taxes thereunder, or to recover any judgment or decree for the recoupment, set-off, refund or credit of, or on any counterclaim for, said taxes, or any part of them. That said legislation imposes onerous conditions which cannot be complied with because evidence of all the facts which operate to affect the sales price of the commodity sold by plaintiff in respect to which the tax is imposed is not available and cannot be produced by plaintiff. That the said processing tax is assessed, levied and collected on the basis of the live weight of the commodity processed by plaintiff. That the said commodity, after being purchased by the plaintiff is converted into nine (9) major articles, and other miscellaneous ones which are affected by separate and distinct market trends and conditions of various fluctuations over periods of time varying in length with each article running from a period of a few days to several months. That upon such conversion of the said commodity into said articles the said commodity loses its

identity. That the prices obtained by plaintiff for said articles or products are determined by competition in open and free markets. That said prices fluctuate daily, and in some cases, hourly. That the determination of the extent to which the purchase price obtained by plaintiff might constitute or be properly held to constitute a portion of the processing tax theretofore paid by plaintiff involves the consideration of factors which it is impossible for plaintiff to establish by proof and that such inability does not arise from any failure on the part of plaintiff to keep accurate and complete records, but arises from circumstances beyond plaintiff's control, which determine the matter of marketing said product and the conditions thereof That by reason of the foregoing requirements of said Act, plaintiff would not be able to recover any part of the tax paid as the proof, the burden of which is placed upon plaintiff, cannot be made by it, and this without any fault on the part of plaintiff, and irrespective of the fact that plaintiff has lost money in the handling of its pork products during each month in which the said Agricultural Adjustment Act has been in operation.

That the purported right, as provided by said Act, to sue for a refund for the amount of tax not passed on, is purely illusory for the reason that an error in the computation of one cent in the amount claimed would result in the loss and forfeiture of the entire amount, even though said amount be several thousand dollars.

II.

That subsequent to the filing of the original Bill of Complaint herein, the Congress of the United States has passed, and the President has approved, an amendment

to the Agricultural Adjustment Act, which said Act adds to the Agricultural Adjustment Act a new section designated as Division 8 of Section 21, subdivision (d) (2), and reading as follows:

"(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceedings relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be

so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail."

That by reason of the enactment of the said Statute, plaintiff has no present remedy at law whatsoever, and is not permitted to sue for refund of processing taxes or to litigate in any tribunal the question of the constitutionality of said Agricultural Adjustment Act, or collection of processing taxes thereunder, or to recover any judgment for the refund thereof.

That under the provisions of said Act plaintiff is deprived of any right to obtain consideration for its claim for refund or recovery of the amount of any tax until after the Act is finally declared invalid. That plaintiff's claim, when filed, must be filed pursuant to rules and regulations of the Commissioner of Internal Revenue, with the approval of the Secretary, which rules have not been promulgated. That by the provisions of said Act the Commissioner of Internal Revenue, before whom such claims must be filed for recovery of refund, is given one year in which to pass thereon after the filing of such claim, and plaintiff cannot bring any action at law until after the period of one year from such filing unless the Commissioner of Internal Revenue has made his ruling upon plaintiff's claim prior to that time. That by reason of the said restriction upon plaintiff's right to sue for refund, there is no plain, speedy, or complete remedy at law, which is available to plaintiff.

WHEREFORE, plaintiff being without a plain, certain, and adequate remedy at law, and being able to obtain relief only in a court of equity prays for all relief sought in the original bill of complaint herein, and for all other and proper relief.

GIBSON, DUNN & CRUTCHER
J. C. MACFARLAND
By J. C. MACFARLAND
Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. C. MACFARLAND being by me first duly sworn, deposes and says: That he is a member of the firm of Messrs. Gibson, Dunn & Crutcher, attorneys for the plaintiff in the above entitled action; that he has read the foregoing Supplemental Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this affidavit for the reason that all officers of plaintiff are at present absent from the County of Los Angeles where said firm has its offices.

J. C. MACFARLAND

Subscribed and sworn to before me
this 10th day of September, 1935.

MARY S. ALEXANDER
Notary Public in and for the County
of Los Angeles, State of California.

[Seal]

[Endorsed]: Filed Sep. 12, 1935 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk.

[Title of Court and Cause]

PETITION FOR APPEAL

To the Hon. Paul J. McCormick, District Judge of the United States, in and for the Southern District of California, Central Division:

The above named plaintiff, feeling itself aggrieved by the Order dissolving the temporary injunction made and entered in this cause on the 30th day of August, 1935, does hereby appeal from said Order vacating the temporary injunction heretofore issued in this suit, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and said plaintiff prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers, upon which said appeal has been based, duly authenticated, shall be sent to the Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper Order touching the security to be required of it to perfect its appeal be made.

And desiring to supersede the result and effect of the Order so made and granted whereby the temporary injunction heretofore granted to the plaintiff is dissolved, the plaintiff tenders bond in such amount as the Court may require for the purpose of preventing and staying the taking effect of said Order of Court and the dissolu-

tion of the temporary injunction heretofore granted, and prays that, with the allowance of the appeal, a supersedeas be issued staying the dissolution of the injunction pending the appeal hereby being taken from the Order dissolving the temporary injunction heretofore granted, and, further, prays that the effect of such supersedeas be that said temporary injunction be restored and placed in full force and effect for and during the period of the appeal to the same extent and in the same manner and with the same conditions and provisions as have, prior to such order of dissolution of said temporary injunction, been in effect and in force.

Dated: September 14, 1935

GIBSON, DUNN & CRUTCHER

By J. C. MacFarland

Attorneys for Plaintiff

[Endorsed]: Received copy of the within Petition this 14th day of September, 1935 Peirson M. Hall D. H. Attorney for Rogan. Filed Sep 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

ARMOUR & COMPANY, a corporation, Plaintiff, -vs- NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California, Defendant.	No. 740-C In Equity ASSIGNMENT OF ERRORS

Now this 13th day of September, 1935, comes the plaintiff, Armour & Company, a corporation, and files this, its Assignment of Errors upon which it will rely in its appeal from the order dissolving the temporary injunction heretofore granted to the plaintiff, which order was made and entered in the above suit on the 30th day of August, 1935. Plaintiff states that the order dissolving the said temporary injunction was erroneous and unjust to the plaintiff in the particulars and for the reasons hereinafter set forth:

FIRST: The Court erred in dissolving said temporary injunction because the said order was not made or entered upon the Court's own motion, but solely upon the motion of the defendant, and without any showing by the defendant necessitating the dissolution of the injunction, and without any showing of change of conditions or circumstances occurring between the time of granting the temporary injunction and the date of said order dissolving

said temporary injunction which required any act by the Court in the exercise of its equitable powers.

SECOND: The Court erred in dissolving said temporary injunction because the circumstances and conditions which were set forth in plaintiff's complaint, and not contradicted by the record in said cause, and which allegations were found by the Court to be true, and which necessitated the granting of the temporary injunction, continued in existence at the time of the said order dissolving the said injunction.

THIRD: The Court erred in dissolving said temporary injunction because the plaintiff was entitled to the temporary injunction until the trial and determination of the suit and during pendency thereof; that said suit is still pending and no answer has been filed to plaintiff's Bill of Complaint by defendant, defendant's motion to dismiss the Bill of Complaint having been denied and the objections interposed by the defendant to the granting of the temporary injunction having been overruled.

FOURTH: The Court erred in dissolving said temporary injunction bceause the said order dissolving the temporary injunction theretofore granted was made by the Court upon the erroneous assumption that the decision or ruling of the United States Circuit Court of Appeals for the Ninth District, in the case of Fisher Flouring Mills Company, a corporation, v. Alex. McK. Vierhus, Individually and as Collector of Internal Revenue for the District of Washington, No. 7938, and companion cases, which decision or ruling was made on or about the 15th day of August, 1935, is binding and conclusive on District Courts of the United States located within the jurisdiction of said United States Circuit Court of Appeals for

the Ninth District, irrespective of the facts herein involved, admitted by the defendants, and found to be true by the Court in its order for temporary injunction, and which facts and recitals are different from and unlike the facts involved and considered by said United States Circuit Court of Appeals in the aforesaid case of Fisher v. Collector.

FIFTH: The Court erred in dissolving said temporary injunction because since the passage by Congress of H. R. 8492, which occurred subsequent to the decision of the Circuit Court of Appeals in the said case of Fisher Flouring Mills Company, a corporation, vs. Alex McK. Vierhus, etc., any remedy at law that plaintiff has heertofore possessed has been rendered so cumbersome, capricious, uncertain, unwieldy, and impossible of proof as to deprive the plaintiff of any and all remedy at law.

SIXTH: The Court erred in dissolving said temporary injunction because, since the passage of the Amendments to the Agricultural Adjustment Act embodied in H. R. 8492, any semblance of a remedy at law that the plaintiff formerly had is no longer in existence.

SEVENTH: The Court erred in dissolving said temporary injunction because the remedy to which plaintiff is relegated, through denial of injunctive relief pending trial, is harsh, oppressive, capricious, cumbersome and costly, entirely illusory, and of no practical or any relief.

EIGHTH: The Court erred in dissolving said temporary injunction because in the nature of the products handled and manufactured by the plaintiff from the commodity upon which the processing tax can be assessed, levied, and collected, it is impossible to determine what

portion, if any, of said processing tax is included in the sales price of the product which is manufactured from the commodity upon which said tax can be assessed, levied, or collected, and thereby plaintiff would not be able to recover any of the tax paid, as the proof, the burden of which is placed upon it by said Amendments to the Agricultural Adjustment Act, cannot be made by it; that such inability does not arise from any failure on the part of plaintiff to keep full, true, and complete records, but because the commodity is converted into various articles which are affected by separate and distinct market trends and conditions of various fluctuations, over periods of time varying in length with each article; and for the reason that while the tax is assessed, levied, and collected on a basis of the live weight of the commodity processed by the plaintiff, said commodity entirely loses its identity upon being converted into said various articles, and it is impossible, upon any sale of said articles which may have heretofore been made by plaintiff, or which may hereafter be made by plaintiff, to show or to produce any evidence whatsoever tending to show from what particular hog or hogs, the articles sold are derived, or to trace the said articles or merchandise involved in any sale back to the commodity processed by plaintiff and upon which the tax is paid.

NINTH: The Court erred in dissolving said temporary injunction because, if plaintiff's claim or claims for refund under the said Act as amended are refused and plaintiff thereupon files suit, the plaintiff is again confronted with the same limitations and restrictions which are imposed upon it in the making of claim, in that, in addition to any other proof required of it in the suit for the recovery of the tax, plaintiff must prove that it has not

passed any part of the tax, which proof is, from a practical standpoint, utterly impossible, whereas, in truth and in fact, it cannot pass the tax to the purchasers of its products as it has no control of the competitive markets in which its products must be sold, and has not done so; and defendants have admitted, by their failure to deny the allegations of the complaint, that plaintiff is unable to pass the processing tax it is compelled to pay or which is assessed against it.

TENTH: The Court erred in dissolving said temporary injunction because any remedy at law that plaintiff may have is not a full or complete or speedy remedy in that it is uncertain whether plaintiff can file any claim for refund or recovery of the amount of any tax or penalty at this time, or whether such claim can be filed only after the final determination of the invalidity of the law imposing the tax; and, in fact, no provision for filing of claims has been made, nor has any machinery for the consideration thereof been provided, except after the Act is finally declared invalid; no means are provided for the consideration of any such claim for refund or repayment of any tax or penalty by the Commissioner until after the law is declared finally invalid; such claim can only be considered in the manner in the Act provided, only after the Act, pursuant to which such tax is assessed, levied, and collected, is finally declared invalid, and the filing or attempted filing of a claim at any prior time would avail the plaintiff nothing and the Commissioner is given one year from the time such Act is declared invalid in which to pass upon the claim of the plaintiff; because the claimant is not permitted to bring any action until the expiry of one year from the time of filing of any claim

for recovery or refund, and such claim for recovery or refund cannot be considered until after the law under which the tax is assessed, levied, and collected has been finally held invalid; the running of the one year's time given to the Commissioner for the purpose of passing on the claim would be calculated from the time the Act under which such taxes are assessed, levied, or collected is finally held invalid if the claim has been filed prior thereto; no obligation is placed upon said Commissioner to determine said claim prior to the expiry of one year.

Until the Act is finally declared invalid, by reason of violating the provisions of the Constitution of the United States of America, or otherwise, plaintiff has no remedy of any sort at law, and, until such time, plaintiff, without intervention of equity, must pay the tax monthly on the basis promulgated by the Secretary of Agriculture, and await final decision as to whether said Act is invalid; that, only after the final determination of such invalidity, do any remedies at law come into being.

In addition to any other compliance with law, plaintiff, though having paid the tax, must show and establish to the satisfaction of the Commissioner of Internal Revenue that the tax paid, or any part thereof, has not been passed to the vendee in any manner whatever. That the commodity handled by the plaintiff, in relation to which processing taxes are assessed, is converted into numerous products and by-products, subject to many variable and various market conditions, and the burden imposed by the law upon plaintiff, in seeking refund, to establish that no part of said tax has been passed to the vendee is impossible of compliance.

The said amendments provide that the transcript of hearing before the Commissioner shall be filed in the Court in which plaintiff may be entitled to maintain any action in case the Commissioner finds that any part of the tax has been passed on in any form whatever to the vendee and shall constitute the record before said court. Plaintiff is required by the Act as amended to file a certified copy of the proceeding had before the Commissioner of Internal Revenue. The Commissioner of Internal Revenue is not a party to such litigation, and any conclusion of the Commissioner is not to be adduced and determined in accordance with the rules of law and the rules of evidence, and no provision of law exists requiring that the Commissioner, or any person conducting such hearing on his behalf, shall be skilled or versed in or have knowledge of rules of law and rules of evidence. On the contrary, such proof is required to be made to the Commissioner's satisfaction.

ELEVENTH: The Court erred in dissolving said temporary injunction because if said Agricultural Adjustment Act as amended is and shall be declared to be invalid, there is no appropriation of funds by Congress now available, or now provided to be available in the future, from which plaintiff has the right to be repaid or will be repaid any amount of processing taxes hereafter paid by it; that while said Act as Amended to date purports to appropriate money to the Secretary of Agriculture for the purpose, among others, of making refunds of processing taxes paid, said appropriation has been exhausted and exceeded by expenditures charged and chargeable

against it and nothing is available of said appropriation from which plaintiff can be paid.

TWELFTH: The Court erred in dissolving said temporary injunction because plaintiff cannot under the Amended Act pursue any remedy at law until the law has been finally declared unconstitutional, and cannot maintain any suit or action for recovery of any tax paid, in any event until action by the Commissioner of Internal Revenue, and the Commissioner of Internal Revenue need not take the action set forth in the Act until one year after the filing of claim; and even after the plaintiff is permitted to maintain an action under the law, the action, in its very nature, is not tried for some time after the bringing thereof; the proof required of plaintiff is detailed, cumbersome, and exacting to a prohibitive extent and, after judgment, an appeal may be had and taken upon issues having nothing to do with the illegality of the tax exacted from the plaintiff, and plaintiff has no way of being compensated for the harassment and vexatiousness imposed upon it.

Under the Amendments to said Act, if plaintiff were to pursue the remedy at law therein outlined and set forth, plaintiff would have no means of recovering the taxes collected under a law which plaintiff alleges to be illegal and invalid, and unconstitutional.

THIRTEENTH: The Court erred in dissolving said temporary injunction because irreparable injury and damage will be suffered by the plaintiff unless plaintiff has

injunctive relief during the pendency of the suit and until its trial and determination, particularly because plaintiff will be compelled to engage in the prosecution of many suits for the recovery of money paid by way of said processing taxes.

Said processing taxes will be payable monthly, and each month constitutes a separate taxable period under the Act as amended. Plaintiff would be compelled to file claim for refund appertaining to each taxable period and, irrespective of the illegality of the processing taxes and the Act of Congress by virtue of which such taxes are assessed, levied and collected, engage in and have placed upon it the cumbersome requirement of showing whether any portion of the tax has been included in the sales price of any of the commodity upon which it is liable for or pays processing taxes; that under the requirements of said Act, claimant is forced to preserve as fully as possible whatever evidence is obtainable as to each transaction of purchase and sale occurring during each month, and plaintiff will be required to bring proceedings involving separate issues as to each said taxable period of one month.

FOURTEENTH: The Court erred in dissolving said temporary injunction because the Court had power to restrain the assessment, levy, or collection of the said tax which is invalid, unlawful, and unconstitutional for the reasons set forth in plaintiff's complaint and under the circumstances found by the Court to be true, establishing plaintiff's right to equitable relief, the Court was not au-

thorized, upon defendant's motion, without any showing of change of circumstances or consideration of the facts entitling the plaintiff to such relief to vacate said Order solely upon the ground that the Ninth Circuit Court of Appeals in a decision involving an application for an injunction pending appeal by another processor upon a record presenting facts in no wise similar to those involved in the present case, had denied such injunction.

FIFTEENTH: The Court erred in dissolving said temporary injunction because unless the Collector of Internal Revenue is restrained in a manner similar to that ordered in the temporary injunction in force herein prior to the Order of the Court, said Collector will file liens upon the property, chattels, goods, wares, merchandise, and assets of plaintiff, and will enter upon its property for the purpose of distraining and selling it, all of which will destroy plaintiff's business, custom, good will, and credit, for which it cannot be adequately or speedily or completely compensated in damages. That these acts of the Collector of Internal Revenue will be repetitive and will appertain to each taxable period of one month each and that, further, in the nature thereof, a trespass upon the property, lands, and tenements of the plaintiff will take place and occur each time the Collector will exercise, as he threatens to do, the things and matters he is required to do under the law in the collection of said processing taxes; that, in each instance, such trespass will occur and be committed, not only by the Collector, but by his agents,

servants, attorneys, deputies, and employees, who are numerous, and such trespass, in each instance, need not occur by the same individuals, but will likely be done and committed by other and different agents, servants, attorneys, deputies, and employees of said Collector, and, in each instance, if the law under which such assessment, levy, and collection is made is declared to be unconstitutional, a different set of individuals, acting as such agents, servants, attorneys, deputies, and employees, may be guilty of trespass and give rise to numerous and various causes and rights of action against such trespassers, and compel the plaintiff to engage in many actions for the relief therefor, all of which are slow and tedious and may be against persons unable to respond in damages, and any such remedy that plaintiff may have will be but an empty remedy and of no avail to it.

SIXTEENTH: The Court erred in dissolving said temporary injunction because the method of seeking relief so placed upon the plaintiff as a taxpayer amounts to a circuitous method of collecting unlawful taxes levied beyond any power of Congress, as given to Congress by the Constitution of the United States of America, and to compel plaintiff to follow the procedure of a purported action at law is simply to deny plaintiff all relief and to subject it to harassment, cost, and great difficulty or proof upon matters appertaining to entirely novel and vexatious accounting matters, not subject to any ready or definite standard, and involving many disputatious elements.

SEVENTEENTH: The Court erred in dissolving said temporary injunction because the Order dissolving the temporary injunction heretofore granted to the plaintiff herein will, in effect, result in taking the property of the plaintiff without due process of law, in that, after taking the property of the plaintiff in satisfaction of the taxes assessed and levied under said Agricultural Adjustment Act, as amended, the remedies provided to the plaintiff, and which plaintiff would be compelled to pursue, where injunctive relief is denied to it, are so cumbersome, costly, and limited and uncertain as to amount to a denial of any relief to it.

EIGHTEENTH: The Court erred in dissolving said temporary injunction because, ever since the assessment, levy, and collection of taxes under the Agricultural Adjustment Act, plaintiff has suffered loss as a processor of hogs, due solely and directly to the tax imposed thereunder, which has prevented plaintiff from earning, during said period, an adequate or reasonable return upon the value of its investment in said business.

The processing taxes imposed are so heavy that the payment of such taxes will, with each payment, tend to diminish the capital of the plaintiff, and to restrict and diminish its operations, and plaintiff will, in the nature of things, be compelled to restrict its business, or, if it abandons its hog processing business, it will be unable to compete with others engaged in a like line of business. That such results will flow naturally, proximately, and

directly by reason of the imposition and collection of said taxes, which are void, invalid, and unconstitutional, in that the Agricultural Adjustment Act, particularly in the respects wherein this plaintiff is concerned, is invalid, unlawful, and unconstitutional, for the reasons and in the particulars set forth in plaintiff's complaint herein.

NINETEENTH: The Court erred in dissolving said temporary injunction because great harm and irreparable injury will be suffered by plaintiff by reason of the dissolution of the temporary injunction and no harm or loss can be incurred or suffered by defendant by its continuance; such obligations as have been incurred by the Secretary of Agriculture were incurred prior to the assessment or levy or collection of any so-called taxes from the plaintiff and no opportunity exists or has been accorded plaintiff to agree to, discuss or in any wise participate or act upon or in connection with the incurring of such obligations, and the sum sought to be levied against and collected from the plaintiff in the guise of such taxes are for the purpose of the payment of such obligations of the Secretary of Agriculture incurred, and which obligations were not incurred in the course of any valid or lawful authority vested in said Secretary of Agriculture.

TWENTIETH: The Court erred in dissolving said temporary injunction because non-compliance by the plaintiff with the Act of Congress set forth in plaintiff's suit, which violation will consist in the non-payment of the taxes imposed under said Act, will subject the plaintiff to great harassment and oppression, and to fines and

penalties, and subject its officers to criminal prosecution therefor.

WHEREFORE, plaintiff prays that the order and decision dissolving the temporary injunction be reversed, and that the Court make such orders as may be necessary or proper to afford plaintiff the relief to which it is entitled and that speedy justice be done to the parties in that behalf.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER,
By J. C. Macfarland
Attorneys for Plaintiff

IRA C. POWERS
Of Counsel

We, the undersigned attorneys, certify that the foregoing Assignment of Errors is made on behalf of the plaintiff, Armour & Company, a corporation, and is, in our opinion, well taken, and the same now constitutes the Assignment of Errors upon which it will rely in its prosecution of the appeal herein.

J. C. MACFARLAND
GIBSON, DUNN & CRUTCHER
By J. C. Macfarland
Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Assignment of Errors this 14th day of September 1935 Peirson M. Hall D H Attorney for Rogan.

Filed Sep 14 1935 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

On motion of Gibson, Dunn & Crutcher and J. C. Macfarland, attorneys for plaintiff, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made and entered on August 30, 1935, dissolving the temporary injunction granted heretofore to the plaintiff in the above entitled suit, on or about the 8th day of August, 1935, be and the same is hereby allowed, and that a certified transcript of the record and all proceedings, papers, instruments, and documents herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit;

That, in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this Court that any relief in the form of supersedeas, whereby the temporary injunction heretofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, should be pursued by the plaintiff in the form of an application for an

injunction pending appeal to be presented to said United States Circuit of Appeals for the Ninth Circuit if the plaintiff wishes to secure such relief.

It is, further, ordered that the cost bond on appeal be fixed in the sum of $250.00.

Dated: September 14th, 1935.

PAUL J. McCORMICK
Judge of said District Court

[Endorsed]: Received copy of the within order this 14th day of September 1935. Peirson M. Hall, D. H. Attorney for Rogan.

Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That the Maryland Casualty Company, a corporation, organized and existing under the laws of the State of Maryland and duly licensed to transact a general surety business in the State of California is held and firmly bound in the penal sum of Two Hundred Fifty Dollars ($250.00) to be paid to defendants, for which payment well and *truly made,* said Maryland Casualty Company binds itself, its successors and assigns by these presents.

The condition of the foregoing bond is such that

WHEREAS on the 30th day of August, 1935, in the District Court of the United States in and for the Southern District of California in a suit pending in that Court wherein Armour & Company, a corporation, was complainant, and Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, was the defendant, an Order and decision was rendered dissolving the temporary injunction theretofore granted herein, and said Armour & Company, a corporation, having been granted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said Order and decision made and entered herein.

NOW, THEREFORE, the condition of this obligation is such that if the said Armour & Company, a corporation, shall prosecute its appeal to effect and answer all costs, if it shall fail to make its plea good, then this obligation shall be void, else to remain in full force and effect.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officers in the County of Los Angeles, State of California, this 6th day of September, 1935.

Maryland Casualty Company

[Seal] By Frances Gray

FRANCES GRAY,
Attorney-in-Fact.

The above bond approved this 14th day of Sept 1935.

Paul J. McCormick

Judge of the District Court of the United States for the Southern District of California

THE PREMIUM CHARGED
FOR THIS BOND IS $10.00.

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 6th day of September, in the year one thousand nine hundred and thirty-five, before me L. W. SUDMEIER, a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared FRANCES GRAY known to me to be the duly authorized Attorney-in-Fact of MARYLAND CASUALTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Corporation, and the said FRANCES GRAY acknowledged to me that he subscribed the name of the MARYLAND CASUALTY COMPANY as Surety, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] L. W. Sudmeier
Notary Public in and for said County and State

My Commission Expires April 14, 1936.

[Endorsed]: Filed Sep 14 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

PRAECIPE

TO R. S. ZIMMERMAN, ESQ., CLERK OF THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Please prepare transcript of record in the above entitled cause to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit under appeal allowed September 14, 1935, and include therein papers, documents and records in said cause as follows:

1. Bill of complaint.
2. Supplemental complaint.
3. Order to show cause issued August 3, 1935.
4. Temporary restraining order.
5. Undertaking on injunction.
6. Order granting temporary injunction.
7. Notice of motion to vacate temporary injunction.
8. Order vacating temporary injunction.
9. All orders and minute entries of the Court herein.
10. Plaintiff's petition for appeal.
11. Plaintiff's assignment of errors.

12. Order allowing appeal.

13. *Certificate* issued returnable to United States Circuit Court of Appeals for the Ninth Circuit.

14. This praecipe.

15. Clerk's final certificate.

J. C. MACFARLAND,
GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland
Attorneys for Plaintiff

IRA C. POWERS
Of Counsel

[Endorsed]: Received copy of the within Praecipe this 14th day of September 1935 Peirson M. Hall, D. H. attorney for defendant Rogan. Filed Sep. 14, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AMENDING PRAECIPE

It is hereby stipulated by and between the parties to the above entitled action that the praecipe for the transcript of record to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit under an appeal allowed September 14, 1935, may be amended by adding thereto the following items: (1) objections to granting of preliminary injunction, (2) motion to dismiss, (3) motion to vacate temporary injunction, (4) petition for rehearing (assignment of errors omitted), and that the same be included in the record on appeal.

J. C. MACFARLAND,
GIBSON, DUNN & CRUTCHER,

By J. C. Macfarland
Attorneys for Plaintiff.

Ira C. Powers
Of Counsel

Peirson M. Hall
PEIRSON M. HALL
Clyde Thomas
CLYDE THOMAS
Attorneys for Defendant.

[Endorsed]: Filed Sep 28 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 103 pages, numbered from 1 to 103, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint and petition for injunction; order to show cause; objections to the granting of a preliminary injunction; motion to dismiss; minute order of August 9, 1935 re order to show cause why preliminary injunction prayed for in bill of complaint should not issue, etc.; temporary injunction; undertaking on injunction; notice of motion to vacate temporary injunction; motion to vacate temporary injunction; minute order of August 27, 1935 re hearing on motions of defendants for orders vacating and setting aside temporary injunctions heretofore entered, etc.; minute order of August 30, 1935 containing memorandum of conclusions made by Judge McCormick; petition for rehearing; minute order of September 12, 1935, re petition for rehearing, hearing on motions to file supplemental bills of complaint, ordering filing of supplemental bills of complaint, oral opinion and orders each motion for rehearing severally denied, etc.; supplemental bill of complaint; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal; praecipe and stipulation amending praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By .

Deputy.